UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/544
8 November 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 544

Case No. 553: LUKAS

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, First Vice-President, presiding; Mr. Arnold Kean; Mr. Luis de Posadas Montero;

Whereas at the request of Ellen Lukas, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 15 July 1990 the time-limit for the filing of an application to the Tribunal;

Whereas, on 11 June 1990, the Applicant filed an application containing the following pleas:

"Section II: Pleas

1. That the UNAT [United Nations Administrative Tribunal] concur in the decision of the United Nations Joint Appeals Board, dated 28 February 1990, the pertinent portion of which reads as follows (...):

'57. The Panel recommends, in view of the unfortunate manner in which the selection process was handled and the unfairness resulting to the Applicant therefrom, and in view of the appellant's competence and experience, that DPI [Department of Public Information] make substantial efforts, promptly, to locate a suitable P-4 post for the appellant.'

2. That the UNAT direct the Secretary-General to carry out promptly his own approval of that decision as communicated to Ms. Lukas in his (Mr. J. Richard Foran's) letter of 13 March 1990, paragraph 3:

'The Secretary-General has accordingly decided to maintain the contested decision. The Secretary-General has further decided to give full and fair consideration to you on a priority basis for any vacant and suitable P-4 post for which you are qualified and interested, taking into account the entire circumstances of your case, and to take no further action on the matter.'

3. That the UNAT carefully review all of the material submitted to and considered by the Joint Appeals Board, including the question of whether the Secretary-General did not violate his own rules and procedures in failing to select and promote to the then existing vacancy from the 'short list' of three candidates certified as acceptable.

4. That the UNAT further examine the record carefully and determine whether it is not apparent that nationality and/or other extraneous factors were not added in the middle of the process which, de facto, constituted prejudice to the career advancement of a fully qualified candidate who should have in all fairness and equity been promoted."

Whereas the Respondent filed his answer on 7 June 1991;

Whereas, on 15 August 1991, the Applicant filed written observations in which she amended her pleas as follows:

"AMENDED PLEAS

18. In view of the above considerations, Applicant respectfully requests the Tribunal:

19. To order the USG[Under-Secretary-General]/DPI to carry out at once the decision of the Secretary-General with regard to the Applicant given on 13 March 1990, and reiterated in a memorandum from the ASG [Assistant Secretary-General] for OHRM [Office of Human Resources Management] (...) and a memorandum from the Officer-in-Charge, A&M [Administration and Management] (...).

20. To find that the Applicant between 1990 and August 1991 was three times wrongfully denied priority consideration for a P-4 post in which she was interested and qualified. These include the post (still-vacant eleven months after it was first advertised) of Palestine Information Officer, Anti-Apartheid, Namibia and Palestine Information Programmes, CPMD[Communications and Project

Management Division]/DPI; the presently-encumbered post of Information Officer, Office of the Director, Information Products Division, DPI; and the presently-encumbered post of Chief, Committee Liaison Unit, Office of the USG/DPI, despite the Secretary-General's decision that she be given priority consideration for any P-4 post in which she was interested and qualified, because of personal bias on the part of the USG/DPI.

20. To order that the Applicant be immediately appointed to the still-vacant post for which she applied on 26 November 1990 (the P-4 Palestine Information Officer post, Anti-Apartheid, Namibia and Palestine Programmes), since this was the first DPI P-4 post to be advertised after the Secretary-General's decision to accept the JAB [Joint Appeals Board] recommendations and accord her priority consideration.

21. To order that Applicant's promotion to the P-4 level be made effective 8 March 1989, the day when, after 13 years of fully satisfactory service without ever having been promoted, she was denied promotion to the post of Human Rights Information Officer, ESDHR[Economic and Social Development and Human Rights Programmes Section]/CPMD, DPI, (UNA-27773-E-Pr-002) which functions she had performed for 18 months.

22. To order that the Applicant's promotion to the P-4 level be made effective to 8 March 1989 for humane reasons. The Applicant is near retirement. Since pensions are based on grade level over the last 36 months of a staff member's service, the USG/DPI's delay in carrying out the JAB's recommendation has already had serious negative effects on her pension.

23. To award one full year's salary at the P-4 level to the Applicant in compensation for the decision of the USG/DPI to this date not to give the Applicant priority consideration for the following posts: Palestine Information Officer, Anti-Apartheid Namibia and Palestine Information Programmes, DPI/CPMD; Chief, Committee Liaison, OUSG[Office of the Under-Secretary-General]/DPI, and Information Officer, Office of the Director, IDP[Information Products Division]/DPI. As of the present writing, bearing in mind the time required to submit an appeal to the JAB, Applicant is awaiting the reply of the Secretary-General to her request that the Palestine post (No. UNA-27773-E-P4-004) be frozen until such time as the Tribunal has rendered its decision. This would preclude a moot outcome to any remedy which the Tribunal might take.

24. In view of the extraordinary nature of the situation in which a clear decision of the Secretary-General was disregarded by the USG/DPI, and as a compensation to the Applicant for her moral injury during the long delay of the settlement of her case, to award the Applicant an additional one year's net base salary."

Whereas the Applicant submitted an additional written statement and additional documents on 30 September 1991;

Whereas, on 18 and 23 October 1991 respectively, the Respondent and the Applicant provided additional information at the request of the Tribunal;

Whereas the Applicant submitted an additional document on 23 October 1991;

Whereas the Respondent submitted an additional written statement on 28 October 1991;

Whereas, on 5 and 7 November 1991 respectively, the Applicant and the Respondent submitted additional written statements and additional documents;

Whereas the Applicant submitted an additional written statement and an additional document on 8 November 1991;

Whereas the facts in the case are as follows:

The Applicant, a United States national, served the United Nations from 1969 to 1972 as an Information Officer and was re-employed in the same capacity by the Organization on 15 November 1976 under a fixed-term appointment at the P-3 level which was extended from time to time and converted to a probationary appointment on 15 April 1979. On 1 February 1980 she was granted a permanent appointment in the Department of Public Information (DPI).

In its 1986 report to the General Assembly (A/41/49), the Group of High-level Intergovernmental Experts (Group of 18) recommended in its Recommendation 37 that "a thorough review of the functions and working methods as well as of the policies of the Department of Public Information should be conducted, with a view to bringing its role and policies up to date in order to improve the capacity and ability of the Department to provide information on United Nations activities as approved by the intergovernmental bodies". In its resolution 41/213 of 19 December 1986, the General Assembly decided that the recommendations, as agreed upon, should be implemented by the Secretary-General and the relevant organs and

bodies of the United Nations. It further decided that, in carrying out his mandate, the Secretary-General should bear in mind Recommendation 15 of the Group of Experts, which it had also approved, regarding the proposed reduction by 15 percent of the overall number of regular budget posts, particularly at the higher levels. A restructuring plan was accordingly prepared by DPI and approved by the Secretary-General. Under that plan, a number of organizational units were to be replaced by new organizational units and the posts and resources allocated to the old units were to be reallocated to the new units. Furthermore, the number of posts in DPI was to be reduced by 108 from a total of 770, a reduction of 14%. The restructuring plan was reviewed by the Committee for Programme and Co-ordination (CPC) at its twenty-eighth session, held from 2 May to 3 June 1988. In its report (A/43/16), the CPC recommended that separate sections should be clearly identified in the Communications and Project Management Service for co-ordinating and undertaking the necessary work relating to (a) issues of economic development and (b) issues of human rights and social development (para. 83). The CPC also recommended that the Secretary-General should accelerate the process of achieving a balanced geographical distribution of posts in DPI, particularly at the senior level (para. 86). The CPC's recommendations were adopted by the General Assembly in its resolution 43/213 of 21 December 1988.

In the meantime, the Under-Secretary-General for Public Information had, on 8 April 1988, sent to all DPI staff members at the Professional level and above a memorandum on "DPI Restructuring" reading in part:

> "Now that the new staffing table for the Department has been approved (see Annex I), the next step in the restructuring of DPI will be to select staff to fill Headquarters posts at the Professional levels and above (P-2/1 through D-1). This process will be carried out in accordance with the attached procedures (see Annex II), approved jointly by the Assistant Secretary-General for Human Resources Management and myself, following discussions between representatives of the Department and of the Office for Human Resources Management, which have also included DPI staff representatives.
>
> 2. As you will see from the procedures there will be three rounds of internal DPI advertising for posts at the

P-2/1 through P-4 levels, for which only qualified DPI staff may apply, and of Secretariat-wide advertising for posts at the P-5 and D-1 levels. These two groups of posts are being treated differently in accordance with the retrenchment procedures to be applied to the Secretariat as a whole.

..."

Annex II to the memorandum described the procedures to be applied towards selecting staff to fill Headquarters posts at the Professional level and above under the new staffing table. It read in part:

"...

Designations of posts for advertising and selection purposes

2. Reflecting the ongoing reorganization and restructuring of the Department, current posts have been designated as:

(a) continuing posts, whose functions will be continued under the new staffing table; and

(b) posts to be discontinued.

...

4. Posts to be discontinued under the present table will be either converted to new posts, i.e., posts with new functions, under the new staffing table or abolished.

Initial Status of DPI staff

5. All DPI staff members currently occupying continuing posts having the required or a smaller number of incumbents will be placed against these posts under the new staffing table. All other DPI staff will need to apply for the balance of posts under the new staffing table, which will be advertised.

Advertising of posts at the P-2/1 through P-4 levels

6. For posts at the P-2/1 through P-4 levels, there will be three rounds of internal advertising, to which only DPI staff may respond:

(a) in the first round, all new posts (posts with new functions) will be advertised together with all vacant continuing posts;

(b) in the second round, all vacancies resulting from (a) above will be advertised together with all continuing posts for which, at that time, there are still potentially too many incumbents (scheduling the advertising of posts for which there are potentially too many incumbents in the second round is likely to eliminate some of the over-encumbered situations. When this occurs, the remaining incumbents of the posts concerned will be placed against the new staffing table).

(c) in the third round, all vacancies resulting from the second round will be advertised.

7. After the three rounds of advertising and selection have been completed, any remaining staff will be considered automatically for any remaining vacancies, i.e. without needing to make further application.

8. The Department will then advise OHRM of staff remaining unplaced under the new staffing table so that these may be considered for posts under the Secretariat-wide vacancy management process. Those staff members will be dealt with in accordance with the Secretariat-wide retrenchment procedures.

9. Posts remaining unfilled after completion of the internal advertising/selection process will also be submitted to OHRM for, as appropriate:

(a) inclusion in the Secretariat-wide vacancy management process; and/or

(b) external recruitment, to be carried out without prejudice to internal applicants.

...

Review and selection process

13. An Ad-hoc Departmental Selection Committee, to be supported by a small secretariat, will review applications received for all posts advertised and:

(a) for posts at the P-2/1 through P-4 levels:

(i) review applications and establish shortlists of preferably not more than three applicants per post, for submission to the Under-Secretary-General; and

(ii) after three rounds of advertising and selection have been completed, make a final review of remaining staff and posts to determine whether any further shortlists can be established for submission to the Under-Secretary-General;

...

14. The Under-Secretary-General for Public Information will make the final selection of staff to fill all of the posts advertised.

..."

On 8 April 1988 the Applicant was advised that the post she was encumbering had been designated as a continuing post in the new staffing table; therefore, she would be placed immediately under the new staffing table as Information Officer in the Communications Services Section of the Communications and Project Management Service; at the same time, however, she was free to apply for other posts to be advertised under the new staffing table. In the second round of the selection procedure, which started on 8 November 1988, the Applicant applied for a P-4 post in the Human Rights and Development Programmes Section of the Communications and Project Management Service. She was short-listed for the post by the Ad hoc Departmental Selection Committee, along with two other candidates, both of whom were also United States nationals, but she was not interviewed or selected; nor were the other two short-listed candidates. On 5 May 1989 the post was advertised Secretariat-wide "due to the particular nature of the functions", the section to which the post belonged being renamed "Economic and Social Development and Human Rights Programmes Section". The Applicant again applied for the post but was not selected.

On 2 May 1989 the Applicant had requested the Secretary-General to review the administrative decision to re-advertise the post for which she had been short-listed, claiming that the decision not to implement the

recommendation of the selection panel not only violated the rules agreed on between the Department and the staff, but would have a direct negative impact on her terms of employment within the United Nations. On 19 May 1989 the Assistant Secretary-General for Human Resources Management replied that the Secretary-General had decided to maintain the decision to re-advertised the post; he explained that, having evaluated the qualifications of all the short-listed candidates, including the work-related experience factor, the Under-Secretary-General for Public Information had decided to re-advertise the post Secretariat-wide in order to seek additional candidates with experience in developing countries.

On 23 May 1989 the Applicant lodged with the Joint Appeals Board an appeal in which she requested under staff rule 111.2(f) that the filling of the post advertised as of 5 May 1989 be suspended. The Board held a summary hearing. On 13 June 1989, the majority of the Panel considering the matter recommended that a stay of administrative action be granted, while the minority recommended that the Applicant's request for a stay be denied. On 20 June 1989 the Applicant was advised that the Secretary-General had decided to take no action on her request on the grounds that she had not shown a likelihood that she would suffer irreparable injury if she was not granted a stay of administrative action since she was not precluded from being considered for the post in question in the third round of the DPI selection process. On 28 February 1990 the Joint Appeals Board submitted its report on the merits of the appeal. The Board's conclusions and recommendation read as follows:

> "Conclusions and recommendation
>
> 55. The Panel concludes that although the selection process had certain shortcomings and reflected poor judgement on the part of management, the appellant has failed to sustain the burden of proving that the contested decision was motivated by extraneous factors, e.g., discrimination against the appellant because of her nationality, or personal prejudice.
>
> 56. The Panel concludes also that the contested decision did not, per se, constitute a violation of the Staff Rules, nor did it substantively violate the internal selection procedures of DPI.

57. The Panel recommends, in view of the unfortunate manner in which the selection process was handled and the unfairness resulting to the appellant therefrom, and in view also of the appellant's competence and experience, that DPI make substantial efforts, promptly, to locate a suitable P-4 post for the appellant."

On 13 March 1990 the Officer-in-Charge of the Department of Administration and Management informed the Applicant that, having re-examined her case in the light of the Board's report, the Secretary-General had decided to maintain the contested decision; the Secretary-General had further decided to give full and fair consideration to her on a priority basis for any vacant and suitable P-4 post for which she was qualified and interested, taking into account the entire circumstances of her case, and to take no further action on the matter. On 11 June 1990 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. DPI changed the requirements of an advertised job in the middle of the selection process, thereby violating their own guidelines.

2. It was incorrect to consider geographic distribution in the promotion process.

3. Despite the unanimous recommendation of the Joint Appeals Board and the efforts of some members of the Administration on behalf of the Applicant, the Under-Secretary-General of DPI consistently denied the Applicant fair consideration for all vacancies for which she applied, thereby showing personal bias against the Applicant and defying the authority of the Secretary-General.

Whereas the Respondent's principal contentions are:

1. The Applicant's non-selection for promotion from a short-list of qualified candidates does not violate her rights as the Applicant received full and fair consideration for that promotion.

2. Job descriptions and vacancy announcements are within the discretionary power of the Secretary-General, and they may be changed and rewritten according to the changing needs of the service.

The Tribunal, having deliberated from 16 October to 8 November 1991, now pronounces the following judgement:

I. In response to a question put by the Tribunal, the Respondent has alluded to an issue of receivability although not raising it directly. The Tribunal finds that this dispute has previously been submitted to the Joint Appeals Board, which has communicated its opinion to the Secretary-General. The Tribunal further finds that the recommendations of the Joint Appeals Board were partially favourable to the Applicant and, although accepted by the Secretary-General, were not carried out. Accordingly the application, including the amended pleas which elaborate on it, is receivable under article 7 of the Tribunal's Statute.

II. The basic dispute in this case was whether the Applicant was treated unfairly as a consequence of the way in which the Administration carried out the selection process connected with a restructuring of DPI. In the Joint Appeals Board's report, unfairness against the Applicant was found and the selection process challenged by the Applicant was viewed as having been conducted in an unfortunate manner. Following the Joint Appeals Board's recommendations, a decision was taken by the Secretary-General and transmitted to the Applicant through a letter dated 13 March 1990. In this letter it was stated that "the Secretary-General has further decided to give full and fair consideration to you on a priority basis for any vacant and suitable P-4 post for which you are qualified and interested, taking into account the entire circumstances of your case...". It is clear that the Secretary-General's decision did not imply that a suitable P-4 post would necessarily be found for the Applicant, but it certainly called for efforts to be made in good faith to that effect and it also required those efforts to be made on a "priority basis". A failure to make such efforts within a reasonable period of time constitutes aggravation of the previous unfair treatment of the Applicant.

III. If substantial steps had been taken in good faith toward finding a suitable P-4 post for the Applicant on a priority basis, there would be no

ground for the Applicant's claim. But the evidence on record shows that, apart from certain expressions of good will which the Applicant mentions, the Administration did not take any such steps to implement the Secretary-General's promise for many months. This is implicitly admitted by the Administration in letters of 17 January 1991 and 5 June 1991, both of which inquire from the Under-Secretary-General for Public Information as to what steps she intends to take to implement the Secretary-General's promise, thus indicating that no definite steps had been taken in that direction since the Secretary-General's decision i.e. since March 1990. Beyond this, there is uncontested evidence regarding a conversation between the Applicant and the Under-Secretary-General which occurred on 11 April 1991 that the inaction was, at least in part, due to displeasure with the Applicant for having appealed to the Joint Appeals Board. The Tribunal considers this deplorable.

IV. This situation remained unaltered until September 1991 - fifteen months after the Applicant had filed her application to the Tribunal in June 1990 - when the Administration initiated conversations with the Applicant in order to reach a settlement by endeavouring to find her a post according to the Secretary-General's promise. These conversations led to the offer to the Applicant of post No. UNA-27-774-E-P4-003, at the P-4 level, an offer that was objected to by the Applicant on the ground that the functions of the post offered were identical to those she had been performing for the last ten years. The circumstances surrounding this offer cause the Tribunal to doubt whether it was made in good faith.

V. At best, this offer only partially fulfills the Secretary-General's commitment of March 1990. This commitment refers to a "suitable P-4 post for which you are qualified and interested". Although the post offered to the Applicant may be deemed to reflect some of the features mentioned in the Secretary-General's commitment, the Applicant's objection of lack of interest to her must be considered reasonable, since the post involves the same functions the Applicant has been performing until now. The offer must therefore be viewed as not fully discharging the Secretary-General's commitment.

VI. It is therefore the Tribunal's opinion that new efforts should be made in good faith to fulfill the Secretary-General's commitment and that, while the Applicant is not entitled to single out or to choose the post to be assigned to her, nevertheless the renewed efforts should take into consideration all the conditions mentioned by the Secretary-General when ordering that efforts should be made to have the Applicant placed in a "suitable P-4 post for which you are qualified and interested". It appears from information received from the Respondent by the Tribunal that promotion of the Applicant to the P-4 level has already taken place. However, this should not affect the renewed efforts referred to in this paragraph.

VII. The Applicant also requests the Tribunal to determine "whether the Secretary-General did not violate his own rules and procedures in failing to select and promote to the then existing vacancy from the 'short list' of three candidates certified as acceptable" and whether "nationality and/or other extraneous factors were not added in the middle of the process which, de facto, constituted prejudice to the career advancement of a fully qualified candidate". In this respect, it is the Tribunal's opinion that, although serious issues are raised by these contentions, the injury that the Applicant might have suffered on these grounds was duly considered by the Secretary-General and that his decision had in view the redress of such irregularities as may have occurred.

VIII. Finally, the Applicant asks to be promoted to a particular P-4 post, effective March 1989. In the Tribunal's view, under the circumstances of this case, such a promotion cannot be ordered by the Tribunal. Any injury previously suffered by the Applicant is to be considered as compensated by the amount granted in the following paragraph.

IX. For the injury suffered by the Applicant as a consequence of her unfair treatment in connection with the Secretary-General's decision conveyed to her on 13 March 1990, the Tribunal orders the Respondent to pay to the Applicant one year of net base salary at level P-4, step VIII.

All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Arnold KEAN
Member

Luis de POSADAS MONTERO
Member

New York, 8 November 1991

Jean HARDY
Acting Executive Secretary